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Analyzing U.S. Antitrust Jurisdiction over Foreign Parties After *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*

I. INTRODUCTION

It is one of the quaint ironies of our democratic system that a statute intended to clarify and simplify the law has in fact undermined the possibility of establishing a clear rule of law. The Free Trade Antitrust Improvement Act of 1982 (the FTAIA)¹ was, as its title suggests, enacted to bring order to the variety of approaches the federal judiciary developed for determining when U.S. antitrust laws apply to foreign parties. However, the statute has generated much confusion, particularly over the inclusion of a single provision requiring foreign anticompetitive activity to “give[] rise to a claim” in the United States.² Although the courts have applied their best interpretive and grammatical talents in trying to make sense of this requirement, the end result has been a three-way circuit split that leaves the question of U.S. antitrust jurisdiction over foreign parties wide open.

To make matters worse, the interpretive problems the FTAIA presents are not merely academic but have far-reaching ramifications in the high-stakes sphere of international law. Other countries have come to resent the nebulous provisions of the FTAIA primarily because they subject unsuspecting foreign parties to U.S. antitrust law. For example, in one case a British company operating in compliance with the laws of the United Kingdom was sued in U.S. court and subjected to treble damages for alleged violations of U.S. antitrust laws.³

Perhaps more troubling to foreign businesses is the fact that the FTAIA seems to allow foreign plaintiffs to assert U.S. jurisdiction over foreign defendants. This means that parties outside of the United States may sue each other in U.S. courts for violations of U.S. law. Inevitably this expansive jurisdiction leads to some odd results, as illustrated by one recent case in which the FTAIA permitted British plaintiffs to

1. 15 U.S.C. § 6a (2000).

2. *Id.*

3. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (holding that a British reinsurance company in compliance with the competition laws of the United Kingdom may still be subject to U.S. antitrust suit).

successfully assert U.S. jurisdiction over British defendants for alleged violations of U.S. antitrust laws occurring in the United Kingdom.⁴

Other nations have retaliated against this expansive and ill-defined use of U.S. antitrust jurisdiction by expanding their own jurisdiction. Many countries have enacted antitrust or competition laws to protect their economic interests,⁵ and most follow the U.S. example by enforcing them against parties outside of their borders. This is especially true of the European Union, which has announced that it will prosecute antitrust violations that affect the Union even if the parties do business outside its borders.⁶ The result has been a myriad of contradictory laws that have had some distressing effects on U.S. economic interests, as illustrated by the foiled merger of General Electric and Honeywell in 2001.⁷ Countries

4. British plaintiffs claimed that a British auction house conducting auctions principally in London had priced its services in violation of U.S. antitrust law. *Kruman v. Christie's Int'l PLC*, 129 F. Supp. 2d 620, 623 (S.D.N.Y. 2001), *aff'd in part, vacated in part*, 284 F.3d 384 (2d Cir. 2002). Foreign plaintiffs have long found it advantageous to bring suit in U.S. courts. With regard to the allures of the U.S. court system, one cannot omit the apt description by British jurist Lord Denning:

As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk off [sic] having to pay anything to the other side The lawyers will charge the litigant nothing for their services but instead they will take 40 per cent of the damages. . . . If they lose, the litigant will have nothing to pay to the other side. . . . There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40 per cent before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards.

Smith Kline & French Labs. v. Bloch, 2 All E.R. 72, 74 (C.A. 1983), *quoted in* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 333 (3d ed. 1999).

5. At the dissolution of the Soviet Union in 1991, only a half-dozen countries had antitrust laws, but as of 2001, more than 100 countries have passed them. Abbott B. Lipsky, Jr., *The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?* FLETCHER F. WORLD AFF., Summer/Fall 2002, at 59, 60.

6. *See* Case 89/85, *In re Wood Pulp Cartel*, 1988 E.C.R. 5193 (holding that EU competition laws apply to activity occurring outside of the Union that nonetheless has an effect within the Union); *see also* Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 172–76 (1999).

7. The U.S. Department of Justice had approved the merger between the two U.S. companies as a matter of course under U.S. law, but the European Union dealt a deathblow to the deal when it asserted jurisdiction and held the merger to be anticompetitive under its laws. *See* Commission Decision of 7 March 2001 Declaring a Concentration to be Incompatible with the Common Market and the EEA Agreement, *General Electric/Honeywell*, COMP/M.2220 (2001); *see also* Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207, 225–29 (2003).

have further responded to U.S. assertions of jurisdiction by adopting “blocking statutes”⁸ and other laws that nullify U.S. judgments.⁹

These issues of extraterritorial jurisdiction have come to a head in the last two years as U.S. courts have adjudicated more suits between foreign parties arising under the vague “gives rise to a claim” requirement of the FTAIA. In resolving these problems courts have, not unexpectedly, reached very different conclusions. The Second Circuit has held that the FTAIA provides broad subject matter jurisdiction over foreign parties, while the Fifth Circuit has read the FTAIA far more narrowly.

This Note examines a third interpretation recently adopted by the D.C. Circuit in *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*¹⁰ This decision seeks to balance the extremes presented by the Second and Fifth Circuits and adopts a middle approach that allows courts to assert jurisdiction over foreign parties only when the conduct in question results in concrete injuries to parties in the United States. This Note concludes that although this approach is not a panacea, it is superior to other approaches because it properly balances the interests of other countries against the interest of the United States in asserting jurisdiction over cartels that harm its commercial interests.

The analysis of this case will begin, in Part II, with a brief background summary of U.S. antitrust law and the role that the FTAIA plays. Part III will then focus on the D.C. Circuit’s interpretation of the “gives rise to a claim” provision in *Empagran*. Part IV will discuss the procedural and policy goals of the FTAIA and determine that, in light of these goals, the *Empagran* interpretation provides the most balanced solution. Finally, Part V will offer a brief conclusion that reviews possible congressional revisions to the FTAIA.

8. “Blocking statutes” impede the U.S. discovery process by making it a criminal offense to release documents to be used in U.S. trials. Australia, Canada, France, Germany, the Netherlands, New Zealand, the Philippines, South Africa, and the United Kingdom have all passed such statutes. RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS § 20.14 (2d ed. 2002). Of these, the United Kingdom’s Protection of Trading Interests Act of 1980 is illustrative. Although not expressly targeted to U.S. antitrust law, the Act impedes elements that are vital to the unique American discovery process, including deposition of witnesses and obtaining documents. *Id.* The Act also has a “clawback” provision that eviscerates punitive awards. *Id.*

9. See Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 505–06 (1998).

10. 315 F.3d 338 (D.C. Cir. 2003).

II. BACKGROUND: THE FTAIA

A. *The Legal Context of the FTAIA*

1. *An introduction to U.S. antitrust law*

The goal of U.S. antitrust law is to maximize market efficiency by preserving competition in commercial markets.¹¹ According to market theory, an economy achieves maximum efficiency when perfect competition exists. Anything short of perfect competition will create inefficiencies such as inflated prices, artificially reduced output, and “deadweight loss” resulting from misallocated resources.¹² Although American antitrust law recognizes the impossibility of achieving perfect competition, it seeks to root out practices, both foreign and domestic, that unnecessarily restrain the free operation of market competition.

The core of U.S. antitrust law is found in the Sherman and Clayton Acts. Passed in 1894, the Sherman Act makes anticompetitive activity illegal, providing that “[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”¹³ The Clayton Act and Federal Trade Commission Act contain similar provisions.¹⁴ The Supreme Court has subsequently shaped the broad language of these statutes into well-defined categories of illegal antitrust activity, the most common of which are monopolies, cartels, tying arrangements, and vertical price fixing. A monopoly is generally defined as an entity that acquires dominant market power and uses that

11. See LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* § 1.5 (2000).

12. See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* §§ 1.2–1.3 (1999).

13. 15 U.S.C. § 1 (2000).

14. The Clayton Act states,

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly . . . or to injure, destroy, or prevent competition

Id. § 13(a). The Federal Trade Commission Act establishes that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” *Id.* § 45(a)(1).

power to force out competitors.¹⁵ A cartel, or horizontal price fixing, occurs when competitors coordinate or conspire to limit competition in any way—most often by fixing prices, agreeing to exclusive territorial divisions, or by boycotting other competitors.¹⁶ An illegal tying arrangement is one in which a company with power in one market asserts power in another market by requiring consumers in both markets to buy both products together.¹⁷ Finally, a vertical price restraint occurs when a manufacturer reduces competition among its retailers by dictating prices and practices.¹⁸

The Clayton Act describes the enforcement of antitrust laws, and Congress has established that the United States government may bring both civil and criminal suits.¹⁹ Private parties injured by anticompetitive activity may also bring suit for treble damages.²⁰ However, such parties must establish standing by showing that they purchased directly from the defendant and suffered actual injury.²¹ Through this Act, with its

15. A monopoly is technically defined as any entity that acquires monopoly power and engages in exclusionary conduct. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

16. Generally, competitors who agree to set a minimum or maximum price for goods violate the Sherman Act. For example, it is per se illegal for a group of doctors to agree to adhere to a price schedule. *See Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982). However, coordination among competitors is not illegal if it provides substantial procompetitive benefits. *See Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979). Competitors cannot agree to avoid competition by granting each other exclusive territorial divisions. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972). Nor can competitors agree to boycott other competitors. *See Associated Press v. United States*, 326 U.S. 1 (1945).

17. Generally, a company is not allowed to use its power in one market to undermine competition in another market. For example, a photocopy machine manufacturer that also provides repair services for its machines cannot use a monopoly of its parts to impede rival repair companies from servicing its machines. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992).

18. For example, if a retailer sells a product at deeply discounted prices, the other retailers cannot agree with the manufacturer to stop supplying the discounter. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

19. Both the Federal Trade Commission and the Department of Justice may bring civil suits. 15 U.S.C. §§ 15a, 45(m). The Department of Justice may also prosecute violations of the Sherman Act as a felony resulting in fines of up to \$10 million or up to three years of imprisonment. *Id.* § 1.

20. *Id.* § 15(a) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit . . .”).

21. *See Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (holding that only direct purchasers have standing to sue under the Clayton Act); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (holding that only a private party that suffers actual injury has standing to sue under the Clayton Act).

powerful treble damages, Congress intended to encourage suits that will both compensate victims and deter violators.²²

Both the Sherman and Clayton Acts specifically indicate that their provisions apply equally to domestic and foreign activities.²³ And indeed, since 1911 the United States has applied its antitrust laws to foreign parties.²⁴ However, since that time the courts have struggled to define the precise reach of U.S. jurisdiction. Because U.S. courts are reluctant to become the enforcers of global competition, they have sought to limit their jurisdiction to those foreign cases that impact U.S. commerce. In foreign antitrust cases, therefore, the crucial inquiry is what kind of impact foreign anticompetitive conduct must have on U.S. commerce before it triggers U.S. jurisdiction. Courts eventually adopted what has been termed the “effects” test, which generally allowed U.S. courts to exercise jurisdiction over foreign parties when the anticompetitive activity had a direct effect on U.S. commerce.²⁵ Most

22. See *Ill. Brick*, 431 U.S. 720.

23. The Sherman Act expressly applies to anticompetitive activity “among the several States, or with foreign nations.” 15 U.S.C. § 1. Similarly, the Clayton Act applies to commerce defined to include “trade or commerce among the several States and with foreign nations.” *Id.* § 12(a).

24. See *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911) (holding that the anticompetitive agreement between a U.S. tobacco syndicate and a British tobacco syndicate was within the reach of U.S. antitrust laws, even though the agreement was condoned under British law).

25. The courts have gradually expanded the jurisdiction of U.S. antitrust laws. Initially the Supreme Court developed a rigid territoriality requirement. See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909) (holding that U.S. antitrust law should not apply to a Costa Rican company acting under the auspices of Costa Rican law). However, this was soon abandoned when it became clear that anticompetitive cartels could easily evade the Sherman Act and erect “perpetual barriers” to U.S. export trade simply by operating from foreign soil. See, e.g., *Am. Tobacco Co.*, 221 U.S. 106. In *American Tobacco*, Chief Justice White applied a “rule of reason,” which imposed U.S. antitrust law to cartels located abroad if they posed a significant threat to U.S. commerce. 221 U.S. at 179–84.

Judge Learned Hand further developed this test and gave it definitive expression as the “effects” test. In *United States v. Aluminum Co. of America (Alcoa)*, the Court, acting without a quorum, held that foreign actions limiting competition are subject to the Sherman Act if they intend to affect U.S. trade and do in fact limit it. 148 F.2d 416, 444 (2d Cir. 1945). Although this test marked a significant expansion of U.S. jurisdiction under the antitrust laws, Justice Hand also warned that extraterritorial jurisdiction should not be stretched too far:

[W]e cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers. . . . We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. On the other hand, it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends

Id. at 443 (citations omitted).

courts adopted this approach, but some went even further and supplemented the direct effects requirement with principles of international comity. These principles essentially bar U.S. jurisdiction over foreign parties when the conduct of the foreign parties is far removed from U.S. interests.²⁶ However, as the number of various “effects” tests multiplied,²⁷ Congress stepped in to establish a single uniform standard by enacting the FTAIA.

2. *The FTAIA*

The Free Trade and Antitrust Improvement Act of 1982 amends the Sherman Act and defines the reach of U.S. antitrust laws over foreign parties by using a modified version of the “effects” test developed by the courts:

26. “International comity” is a legal doctrine that counsels a sovereign nation to refrain from applying its laws when the laws of another sovereign would be more appropriate. *See* 45 AM. JUR. 2D *International Law* § 7 (1999) (“[I]nternational comity’ is a doctrine that counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.”). For a more detailed discussion of comity, see *infra* Part IV.C.3.

In *Alcoa*, Judge Hand suggested that the comity concerns defined the outer limits of U.S. antitrust jurisdiction. By way of illustration, he pointed to the fact that many trade agreements in Europe and South America may clearly have an adverse competitive effect on American imports; “[y]et, when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.” *Alcoa*, 148 F.2d at 443.

Many jurisdictions adopted varieties of the “effects” test that sought to balance comity considerations. Most significant among these was the Ninth Circuit’s holding in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 608–15 (9th Cir. 1976). In *Timberlane*, the Ninth Circuit defined the outer limits of U.S. jurisdiction by adopting a comity test barring suits under U.S. antitrust laws when the U.S. interests are small compared to the contrary interests of other nations. *Id.* at 609. (“[I]t is evident that at some point the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.”). Some jurisdictions have followed the reasoning in *Timberlane*. *See, e.g.*, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979).

27. As the number and diversity of these tests grew in the late 1970s, the need for a uniform definition of “effects” became apparent. For example, the Southern District of New York alone articulated at least three different “effects” tests from 1977 to 1979. *Compare* *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 687 (S.D.N.Y. 1979) (“[I]t is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not *De minimis*.”), *with* *Waldbaum v. Worldvision Enters., Inc.*, P 25,049, 1978 WL 956, *4 (S.D.N.Y. Nov. 21, 1978) (conduct must have an “anti-competitive effect[] in the United States”), *and* *Industria Siciliana Asfalti, Bitumi, S.P.A. v. Exxon Research & Eng’g. Co.*, P 61,256, 1977 WL 1353, *11 (S.D.N.Y. Jan. 18, 1977) (holding that conduct must have an “impact on United States commerce”). *See also* H.R. REP. NO. 97-686, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490 (providing a sampling of “effects” tests from several jurisdictions).

[T]his [A]ct shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.²⁸

The FTAIA is not a paragon of clarity. Put in simpler terms, the statute is comprised of three provisions:

(1) The Sherman Act applies in full force to conduct involving import trade or import commerce.

(2) For all other conduct, the Sherman Act applies only to conduct that

(A) has a direct, substantial, and reasonably foreseeable effect

28. 15 U.S.C. §6a (2000).

29. Most courts have treated the FTAIA as a statute governing subject matter jurisdiction. *See, e.g.,* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 n.22 (1993) (indicating that the FTAIA governs subject matter jurisdiction); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003) (finding that the FTAIA addresses subject matter jurisdiction); *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 343 (D.C. Cir. 2003) (treating the FTAIA as defining the scope of federal subject matter jurisdiction over foreign plaintiffs); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 390 (2d Cir. 2002) (same); *Den Norske Stats Oljeselskap AS v. HeereMac Vof (Statoil)*, 241 F.3d 420, 424 (5th Cir. 2001) (same); *see also* H.R. REP. NO. 97-686, at 13, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498 (noting that the FTAIA “more precisely defin[es] the subject matter jurisdiction of U.S. antitrust law”). *But see United Phosphorus*, 322 F.3d at 953–65 (Wood, J., dissenting) (finding that the FTAIA is an “element” statute, adding additional elements to Sherman Act requirements rather than imposing limits to subject matter jurisdiction).

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on U.S. commerce or U.S. export trade; and

(B) such effect gives rise to a claim under the Sherman Act.

(3) For conduct affecting only U.S. export trade, the Sherman Act will only punish injuries to U.S. export businesses.

A few points can be made about the FTAIA. First, it is evident that the FTAIA is a procedural statute that defines the scope of U.S. subject matter jurisdiction over foreign and domestic parties.²⁹ As a procedural statute, the FTAIA is only one of the hurdles that foreign plaintiffs must overcome in order to establish jurisdiction in federal courts. Other doctrines limiting foreign plaintiffs' accessibility to U.S. courts include the requirements for constitutional standing,³⁰ personal jurisdiction over defendants,³¹ and antitrust standing.³²

Furthermore, the FTAIA makes clear that the Sherman Act applies in full force to all "import trade or import commerce" with the United States.³³ This means that anyone who imports goods or services into the United States—whether domestic or foreign—is subject to the Sherman Act.

30. Foreign plaintiffs may not have standing if enforcement of the judgment depends on a third party. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (noting that in order to establish standing, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976))).

31. Foreign plaintiffs may have difficulty in asserting personal jurisdiction over remote plaintiffs. The due process consideration in the "minimum contacts" analysis requires the court to consider whether the defendant "purposefully avail[ed]" himself of U.S. laws and could have reasonably foreseen suit being brought in a U.S. forum. Courts must also weigh other factors, including "traditional notions of fair play and substantial justice," which may require declining personal jurisdiction if adjudication in a U.S. forum would greatly inconvenience the defendant. *Asahi Metal Indus. Co., v. Superior Court*, 480 U.S. 102, 108–13 (1987).

32. The House Report for the FTAIA indicates that foreign plaintiffs must meet the elements for antitrust standing. H.R. REP. NO. 97-686, at 11, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2496. These requirements are mentioned *infra* Part II.A.1. Although still unclear, recent Supreme Court holdings suggest that antitrust standing may be granted only to plaintiffs who can assert domestic injury. *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983) (holding that the antitrust laws protect only the "economic freedom of participants in the relevant market"); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 480 (1982) (holding that antitrust suits should be limited to those plaintiffs who are "within that area of the economy . . . endangered by [the] breakdown of competitive conditions" (quoting *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 129 (9th Cir. 1973))).

33. Congress presumed that all import activity would always have a sufficient impact on the U.S. market to warrant jurisdiction. *See* H.R. REP. NO. 97-686 at 9, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494 ("[I]t is important that there be no misunderstanding that import restraints, which can be damaging to American consumers, remained covered by the law.")

Finally, with respect to nonimport activity (i.e., all other forms of commerce, domestic and international), the FTAIA applies a modified version of the “effects” test to determine whether the United States will assert antitrust jurisdiction. Interestingly, the FTAIA does not adopt the elaborate comity considerations developed by some courts. Rather, it uses an “effects” test composed of two requirements. First, subsection (1) of the FTAIA requires the “effect” on U.S. commerce to be “direct, substantial, and reasonably foreseeable.”³⁴ Second, once the requisite “effect” exists, subsection (2) requires that the “effect give[] rise to a claim” under the Sherman Act.³⁵

*B. Interpreting the FTAIA’s Subsection (2)
“Gives Rise to a Claim” Requirement*

As a practical matter, the first of these requirements is straightforward, but the second presents considerable difficulty. The “direct, substantial, and reasonably foreseeable effect” requirement is not new and has long been a part of U.S. extraterritorial jurisdiction.³⁶

34. 15 U.S.C. § 6a(1).

35. *Id.* § 6a(2).

36. The “direct, substantial, and foreseeable” standard has been one of the long-standing factors used to assess whether U.S. jurisdiction over foreign parties is “reasonable.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(2)(a) (1988). Courts have applied a similar standard in antitrust cases. *See Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614 (9th Cir. 1976) (holding that U.S. extraterritorial jurisdiction should be exercised when, among other considerations, the effect on the United States is significant and foreseeable); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297 (3d Cir. 1979) (finding that the United States should exercise extraterritorial jurisdiction when, among other considerations, the effect on the U.S. has “[r]elative importance” and is intentional or foreseeable).

Under the FTAIA, the “direct, substantial, and reasonably foreseeable effect” test has the purpose of assuring that foreign conduct that injures the U.S. economy will be subject to the Sherman Act. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 n.23 (1993) (“The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy”); H.R. REP. NO. 97-686 at 2–3, 9–10, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487–88, 2494–95 (explaining that the “effects” test assures that U.S. antitrust law does not apply to “wholly foreign” transactions that do not have an effect on the United States). Therefore, the “direct, substantial, and reasonably foreseeable effect” test presents a relatively low threshold and is met when the defendants market their products or services in the U.S. *See United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 952–53 (7th Cir. 2003) (finding that “direct, substantial, and reasonably foreseeable effect” on the United States did not exist when defendant intended to use its product to make pharmaceuticals in India, but did exist when defendant imported its product to the United States through a third party in order to make rocket motors); *Den Norske Stats Oljeselskap AS v. HeereMac Vof (Statoil)*, 241 F.3d 420, 424, 426–27 (5th Cir. 2001) (finding that a “direct, substantial, and reasonably foreseeable effect” on the United States occurred when a foreign cartel of offshore drilling services allocated an exclusive market share to its members operating in the United States, which initiated a chain reaction of increased U.S. expenses for oil drilling, which also raised

However, the subsection (2) “gives rise to a claim” requirement is entirely new and much more difficult to apply. The statute defines neither what “a claim” means nor when the claim has “arisen.” Moreover, this language is found nowhere else among the federal statutes.³⁷

In many cases the precise definition of “a claim” is not important, particularly when the plaintiff is a U.S. company. For example, a common scenario is one in which a foreign cartel tries to drive a U.S. exporter out of business by fixing prices. U.S. courts would have jurisdiction to grant relief under the FTAIA because (1) the price fixing would have a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce and (2) the “effect” would give rise to a claim—namely, the claim raised by the U.S. company.

However, the definition of “a claim” becomes crucial when a foreign plaintiff brings a suit in the United States for injuries sustained outside of the country. For example, suppose a Russian cartel uses price fixing to drive a Canadian competitor out of business. In this case, U.S. jurisdiction over the claim is less certain. The Canadian company may be able to establish that the cartel’s price fixing also affected prices in the United States, thereby having a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce. Even so, the Canadian company must also show that the higher prices in the United States “give[] rise to a claim” under the Sherman Act. This requirement could mean any number of things. It could simply mean that any claim will do, including that of the Canadian company, in which case a U.S. court would have jurisdiction. It could also require the claim to be raised by a U.S. plaintiff, in which case the Canadian company would have to look elsewhere for relief.

This tangle of possible meanings has created a three-way circuit split. In *Den Norske Stats Oljeselskap AS v. HeereMac Vof (Statoil)*,³⁸ the Fifth Circuit held that the “gives rise to a claim” requirement only allows plaintiffs injured in connection with the “effect” on U.S. commerce to bring suit in U.S. courts. However, in *Kruman v. Christie’s*

the price of oil and gas to consumers). The mere fact that the company is owned by Americans is not alone sufficient to establish that the company has the necessary “effect” on the United States. See H.R. REP NO. 97-686 at 9, reprinted in 1982 U.S.C.C.A.N. 2487, 2494.

37. The language of the FTAIA does, however, amend the Federal Trade Commission Act to include this language. 15 U.S.C. § 45(g), (n) (2000).

38. 241 F.3d 420 (5th Cir. 2001).

International,³⁹ the Second Circuit disagreed and adopted a much more lenient approach, which grants jurisdiction when plaintiffs show evidence of a hypothetical claim in the United States. As will be discussed below, the D.C. Circuit has adopted yet another approach.

1. Statoil: The “Nexus” Rule

As one of the first circuits to rule on the issue, the Fifth Circuit held that the “gives rise to a claim” requirement should be interpreted narrowly to restrict foreign plaintiffs injured outside of the United States from seeking relief in U.S. courts. In *Statoil*, a Norwegian plaintiff brought a private suit under the Clayton Act against Dutch firms that had been subject to U.S. Department of Justice prosecution and had pled guilty to violations of U.S. antitrust law.⁴⁰ The Norwegian plaintiff claimed that the Dutch defendants, as part of a price-fixing cartel, had successfully raised prices on heavy-lift barge services in the North Sea.⁴¹ The plaintiff went on to assert that the FTAIA provided jurisdiction for his claim because the defendants’ conduct had also had a “direct, substantial, and reasonably foreseeable effect”⁴² on U.S. commerce because it had raised prices for such services in the Gulf of Mexico.

The Fifth Circuit denied jurisdiction, holding that the FTAIA’s “gives rise to a claim” requirement imposes a high bar for foreign plaintiffs. In its view, once the plaintiff has shown that the defendant’s activity has had the requisite effect on U.S. commerce, a plaintiff must also show that such effect caused its injury.⁴³ In other words, the plaintiff must show that its claim has a nexus with the effect on U.S. commerce. In applying this rule to the facts of the case, the court found that although the anticompetitive activity had an effect on the United States by raising prices in the Gulf of Mexico, the plaintiff’s injuries had no nexus with the United States because they occurred in the North Sea.⁴⁴

To support its holding, the court looked to the text, legislative history, and the policy goals of the FTAIA. Textually, the court found that the plain language supported this view because subsection (2) clearly

39. 284 F.3d 384 (2d Cir. 2002).

40. 241 F.3d at 422–23.

41. *Id.* at 422.

42. 15 U.S.C. § 6a(1) (2000).

43. *Statoil*, 241 F.3d at 427.

44. *Id.*

requires the plaintiff's claim to arise from the effect on U.S. commerce.⁴⁵ Referring to the legislative history, the court also found statements in the House Judiciary Committee Report that the Sherman Act should not apply to "wholly foreign" transactions between two foreign parties.⁴⁶ Finally, the court relied on the policy concern that a broad reading of the FTAIA "would open United States courts to global claims on a scale never intended by Congress."⁴⁷ Judge Patrick E. Higginbotham dissented, raising a creative textual argument and a further policy concern⁴⁸ that the Second Circuit eventually adopted in the *Kruman* case.

2. *Kruman v. Christie's International PLC: The "substantive provisions" test*

The Fifth Circuit's holding in *Statoil* expressed the near unanimous view of the lower courts.⁴⁹ However, a year later the Second Circuit, in *Kruman v. Christie's International PLC*,⁵⁰ upset this unanimity. The Second Circuit took the opposite approach and held that the FTAIA

45. *Id.* at 428 ("[T]he plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.").

46. *Id.* at 428–29 (quoting H.R. REP. NO. 97-686 at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N., 2487, 2495).

47. *Id.* at 431.

48. *Id.* at 432–33 (Higginbotham, J., dissenting).

49. Lower courts have almost unanimously relied on a rule similar to that adopted by the Fifth Circuit. *See* *Crompton Corp. v. Clariant Corp.*, 220 F. Supp. 2d 569, 571–72 (M.D. La. 2002) (adopting the holding in *Statoil*); *Kruman v. Christie's Int'l PLC*, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001) ("[T]he effects giving rise to jurisdiction also are the basis for the alleged injury."), *aff'd in part, vacated in part*, 284 F.3d 384 (2d Cir. 2002); *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 716 (D. Md. 2001) ("[A] plaintiff who has not participated in the U.S. domestic market may not bring a Sherman Act claim under the FTAIA."); *Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc.*, 153 F. Supp. 2d 700, 704 ("[The FTAIA] requires foreign plaintiffs asserting a claim under United States antitrust laws to show . . . that an anticompetitive effect on the United States market place must give rise to plaintiff's claimed injuries."); *Metallgesellschaft Ag v. Sumitomo Corp. (in re Copper Antitrust Litig.)*, 117 F. Supp. 2d 875, 885 (W.D. Wis. 2000) ("Nothing . . . suggests that Congress intended that the scope of recovery would extend to persons injured overseas by effects other than those felt by American markets."), *rev'd on other grounds*, *Loeb Indus., Inc v. Sumimoto Corp.*, 306 F.3d 469 (7th Cir. 2002); *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, 1997 WL 732498, at *4 (N.D. Cal. Nov. 19, 1997) ("Because the relevant market is the United States domestic market, the more appropriate plaintiffs to bring suit against defendants are the consumers injured by defendants' actions in the United States."); *De Atucha v. Commodity Exch., Inc.*, 608 F. Supp. 510, 518 (S.D.N.Y. 1985) (holding that plaintiff's claim of injury in a foreign market "is too attenuated to allow the antitrust claim").

50. 284 F.3d 384 (2d Cir. 2002).

provides a liberal standard for allowing foreign plaintiffs to seek relief in U.S. courts.

The case involved a price-fixing agreement between the British firm of Sotheby's Holdings and the American firm of Christie's International, the two largest auction houses in the world. Like the defendant in the *Statoil* case, Christie's admitted to an antitrust violation after the Department of Justice initiated an investigation. Thereafter, several private plaintiffs, both domestic and foreign, filed suits for treble damages under the Clayton Act.⁵¹ The domestic plaintiffs settled their suits, but the foreign plaintiffs went to trial. At trial, the lower court followed *Statoil's* reasoning and found that the FTAIA did not extend subject matter jurisdiction to their claims because their injuries occurred outside of U.S. commerce.⁵²

The Second Circuit reversed, holding that the FTAIA grants wide jurisdiction over foreign parties. The court found that once the requisite effect on U.S. commerce had been established the "gives rise to a claim" requirement did not impose a significant barrier. The plaintiff need only show that the effect on U.S. commerce violated the substantive provisions of the Sherman Act. In other words, the court determined that U.S. courts have jurisdiction whenever the effect would give rise to a hypothetical or inchoate claim in the United States.

Like the Fifth Circuit, the Second Circuit supported its reasoning with textual arguments, legislative history, and policy concerns. Textually, the court adopted Judge Higginbotham's argument from the dissent in *Statoil*. Judge Higginbotham had noted that subsection (2) of the FTAIA requires the effect to give rise to "a" claim and not "the" claim. In Higginbotham's assessment, Congress's choice of using the indefinite article suggests that the type of claim intended by subsection (2) need not be "the" plaintiff's claim nor even an actual claim.⁵³ The Second Circuit took this argument even further and found that because subsection (2) referred specifically to "a" Sherman Act claim, and because Sherman Act claims are generally brought by the government, Congress intended "a" claim to refer to a general claim that could be brought by the government, even if it had not been. The court concluded

51. *Id.* at 391–92.

52. *See* *Kruman, v. Christie's Int'l PLC*, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001).

53. *See* *Kruman*, 284 F.3d at 400; *see also* *Den Norske Stats Oljeselskap AS v. HeereMac Vof (Statoil)*, 241 F.3d 420, 432–33 (5th Cir. 2001) (Higginbotham, J., dissenting).

that “a” claim refers to any violation of the substantive provisions of the Sherman Act, even when no one has actually asserted such a claim.⁵⁴

The court also used policy concerns raised in the legislative history to support its broad assertion of U.S. jurisdiction over foreign parties. It relied on several passages indicating that foreign plaintiffs would be instrumental in creating a network of deterrence. Above all, foreign plaintiffs, drawn to U.S. courts by the promise of treble damages, would act as whistleblowers, alerting the United States to the existence of otherwise unknown foreign cartels. Furthermore, allowing foreign plaintiffs to sue would also magnify the damages imposed on cartels. A cartel faced with the possibility of suits from its victims across the world would likely think twice before doing anything that may have an effect on U.S. commerce.⁵⁵

III. *EMPAGRAN S.A. v. F. HOFFMAN-LAROCHE, LTD.*

A. Background

In *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*,⁵⁶ plaintiffs from Australia, Belgium, Ecuador, Indonesia, Mexico, Panama, the Ukraine, and the United Kingdom, along with two U.S. corporations, brought an antitrust suit under the FTAIA against approximately twenty foreign corporations in the business of manufacturing and distributing vitamins.⁵⁷ The plaintiffs claimed that the defendants had entered into “a massive and long-running conspiracy” to fix prices, allocate markets, and conduct other activities intended to unlawfully raise prices.⁵⁸ However, because none of the defendants’ conduct had occurred in the United

54. *Kruman*, 284 F.3d at 399–400 (finding that jurisdiction in the United States “is not predicated on the existence of an injury to a plaintiff,” but upon injury to U.S. commerce).

55. *Id.* at 403.

[W]hen anticompetitive conduct is directed at both foreign and domestic markets, the success of an anticompetitive scheme in foreign markets may enhance the effectiveness of an anticompetitive scheme in the domestic market. When a foreign scheme magnifies the effect of the domestic scheme, and plaintiffs affected only by the foreign scheme have no remedy under our laws, the perpetrator of the scheme may have a greater incentive to pursue both the foreign scheme and the domestic scheme rather than the domestic scheme alone.

Id. (citing H.R. REP. NO. 97-686, at 10, reprinted in 1982 U.S.C.C.A.N. 2487, 2495).

56. 315 F.3d 338 (D.C. Cir. 2003).

57. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, No. Civ.001686TFH 2001 WL 761360, at *1 (D.D.C. June 7, 2001).

58. *Empagran*, 315 F.3d at 341–42.

States, and because none of the plaintiffs had been injured as part of U.S. commerce, the defendants moved to dismiss the claims for lack of subject matter jurisdiction.⁵⁹

The United States District Court for the District of Columbia granted the motion and dismissed the suit. The court followed the Fifth Circuit in holding that it was not sufficient for the plaintiffs to show that the defendants' conspiracy had an effect on U.S. commerce; the plaintiffs must also show that their injury occurred as a result of such effects on U.S. commerce.⁶⁰ The court noted that, up to that time, the case law had almost unanimously adopted such a rule.⁶¹

B. Holding

The D.C. Circuit reversed and found that the court had subject matter jurisdiction and that the plaintiffs had standing. The court noted the differences between the *Statoil* and *Kruman* interpretations of the FTAIA and sought to fashion a "view of the statute [that] falls somewhere between the views of the Fifth and Second Circuits, albeit somewhat closer to [*Kruman*] than [*Statoil*]." ⁶² The court found this middle ground by crafting a rule that rejected both the narrow "nexus" rule of *Statoil* and the broad "substantive provisions" rule in *Kruman*.

The D.C. Circuit adopted a rule that plaintiffs injured anywhere in the world could bring an antitrust suit in the United States as long as they could prove actual or threatened injury to persons in the United States. The court held that the "gives rise to a claim" element of the FTAIA requires a foreign plaintiff to "allege that some private person or entity has suffered actual or threatened injury as a result of the U.S. effect of the defendant's violation of the Sherman Act."⁶³ In other words, the foreign plaintiff must establish that "the conduct's harmful effect on United States commerce . . . give[s] rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court."⁶⁴ Based on this rule, the court found that the foreign plaintiffs had standing because they had brought suit alongside U.S. plaintiffs who had suffered actual injury in the United States.⁶⁵

59. *Id.*

60. *Empagran*, 2001 WL 761360, at *3-4.

61. *Id.*

62. *Empagran*, 315 F.3d at 349.

63. *Id.* at 352.

64. *Id.* at 341.

65. *Id.*

C. Reasoning

Like the other circuits, the D.C. Circuit relied on a combination of textual arguments, legislative history, and policy considerations. First, the court dismissed two technical textual arguments relating to the proviso at the end of the FTAIA and the definition of “unless.”⁶⁶ The court went on to find as a basic matter that the “usual meaning of ‘a claim’ is a private action.”⁶⁷ The court acknowledged that “a claim” also refers to governmental action, but disagreed with the *Kruman* court’s assumption that the “claim” contemplated by subsection (2) of the FTAIA is limited to governmental claims.⁶⁸ Based on this reasoning, the court found that a plaintiff cannot merely assert an abstract claim that could be raised by the government, but must instead assert that someone in the United States would have a private claim arising from actual injury due to the effect on U.S. commerce.

In weighing the legislative history, the court found that although passages support both the narrow and broad views of jurisdiction, the history “as a whole” supports the broader view.⁶⁹ The court also found, like the *Kruman* court, that the determinative policy of the FTAIA was deterrence and that, in light of this purpose, foreign plaintiffs should be given the opportunity to seek relief in U.S. courts.⁷⁰

IV. ANALYSIS

As we have seen, the dilemma over interpreting the “gives rise to a claim” provision of the FTAIA only affects a narrow range of plaintiffs,

66. *See id.* at 348–49. The first argument was originally adopted by the *Kruman* court and suggests, in essence, that a narrow reading of the FTAIA renders superfluous the proviso appearing at the end of the FTAIA. The proviso requires that when the conduct in question affects only U.S. export trade (as opposed to U.S. commerce in general), then the Sherman Act “shall apply to such conduct only for injury to export business in the United States.” *Id.* at 342 (quoting 15 U.S.C. § 6a (2000)). The argument goes that if Congress had meant to require foreign plaintiffs to have an injury nexus with the effect on the United States, then it would not have needed to include the proviso, which essentially clarifies that the Sherman Act will only allow U.S. businesses to recover. *See Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 396 (2d Cir. 2002). The D.C. Circuit rejected this argument because the proviso can be understood as a damage-limiting provision rather than a barrier to claims. *Empagran*, 315 F.3d at 349. The court also rejected the argument that had Congress intended a narrow application of the FTAIA, it would have written the term “unless” as “to the extent that.” The court recognized that this argument parsed the language too much. *Id.*

67. *Empagran*, 315 F.3d at 351.

68. *Id.*

69. *Id.* at 352. The court cited the legislative history passages found *infra* notes 83–84.

70. *Id.* at 355–57.

namely, foreign plaintiffs who suffer anticompetitive injury outside of the United States. The three federal circuits that have addressed the issue have interpreted the “gives rise to a claim” requirement in three different ways:

(1) “gives rise to a claim” imposes a high bar on foreign plaintiffs, requiring them to show that the defendant’s anticompetitive activities caused the plaintiff’s injury in U.S. commerce (*Statoil*);⁷¹

(2) “gives rise to a claim” imposes a very low bar on foreign plaintiffs, requiring them to show only that the defendant’s anticompetitive activities amount to a violation of the substantive provisions of the Sherman Act in the United States (*Kruman*);⁷²

(3) “gives rise to a claim” imposes a moderate bar on foreign plaintiffs, requiring them to show only that the defendant’s anticompetitive activities have caused actual or threatened injury to a private party in the United States (*Empagran*).⁷³

Each of these interpretations has relied on the text, legislative history, and policy concerns of the FTAIA.

The remainder of this Note will attempt to determine which of these is the superior approach. In doing so, it recognizes that the text and legislative history of the FTAIA have largely proven inconclusive, and therefore, the key to defining the best interpretation is found in the policy goals underlying the statute. This analysis concludes that the *Empagran* approach maximizes the goals of the statute and avoids many of the shortcomings of the *Statoil* and *Kruman* approaches.

A. Modes of Statutory Interpretation

There is no uniform or “official” method of interpreting statutes. The *Statoil*, *Kruman*, and *Empagran* cases each demonstrate that when confronted with a vague statute like the FTAIA, courts rely on a variety of interpretive tools, including the text of the statute, legislative history, and general policy concerns. Where neither the text of the statute nor the legislative history provides any conclusive insights about the meaning of a provision, courts are justified in interpreting the provision in light of

71. See *Den Norske Stats Oljeselskap AS v. HeereMac Vof (Statoil)*, 241 F.3d 420, 428 (5th Cir. 2001) (“In sum, we find that the plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.”).

72. See *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 400 (2d Cir. 2002).

73. See *Empagran*, 315 F.3d at 352 (“We hold that . . . ‘giv[ing] rise to a claim’ means giving rise to someone’s private claim for damages or equitable relief.”).

the underlying purposes of the statute.⁷⁴ Such “purposivist” analysis⁷⁵ begins by identifying the policy goals of the statute that can be derived from the text, legislative history, and historical context of the statute.⁷⁶ Once the policy goals of the statute are defined, the court interprets the ambiguous provision in the manner that best promotes the policy goals. In the case of the FTAIA, where the three-way circuit split among the federal courts suggests that the text and legislative history of the FTAIA have proven inapposite, the best interpretation of the “gives rise to a claim” requirement will be that which serves the broader purposes of the FTAIA.

*B. The Interpretive Limits of the Text and
Legislative History of the FTAIA*

1. The limits of textual interpretation

Textual analysis has the goal of finding the interpretation that does the “least violence to the text” and finds “ordinary usage” of the statute.⁷⁷ In the case of the FTAIA, this is a daunting task considering that all three circuit courts claimed to give effect to the “plain meaning” of the FTAIA and yet reached very different conclusions.⁷⁸ As has been discussed, the textual analyses in these cases have ranged from grammatical hair-splitting (Judge Higginbotham’s argument searching for the precise meaning of the article “a”) to sweeping generalizations (the *Empagran* court’s assertion that the most obvious meaning of “a

74. When the text is not clear, the interpreter may “read [the statute] against the background of the legislative history . . . and the historical context from which the Act arose.” *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201 (1979).

75. I have borrowed the term “purposivist” from the work of Professors William N. Eskridge, Jr. and Phillip P. Frickey, who are among the scholars to have identified it as one of the methodologies for statutory interpretation adopted by the U.S. Supreme Court. *See* William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325–26 (1990).

76. The purpose of a statute can be gleaned from the text of the statute itself. *See* *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 572 (1982) (“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.” (quoting *United States v. Am. Trucking Ass’ns, Inc.*, 310 U.S. 534, 543 (1940))).

77. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528–29 (1989) (Scalia, J., concurring).

78. *Empagran*, 315 F.3d at 350 (finding that its interpretation of the FTAIA “has the appeal of literalism”); *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 400 (2d Cir. 2002) (finding that the “language is clear”); *Den Norske Stats Oljeselskap AS v. HeereMac Vof (Statoil)*, 241 F.3d 420, 428 (5th Cir. 2001) (finding that the “plain language of the relevant statutes is clear and controlling”).

claim” is a private claim). Ultimately these close—and often creative—readings of the statute do little to arrive at a convincingly objective meaning from the text.

In fact, these cases illustrate that any effort to discover the “ordinary usage” of the FTAIA will be met by several insurmountable difficulties. First, the “gives rise to a claim” requirement is grammatically imprecise because it does not define the type of nexus required between the “effect” and the “claim.”⁷⁹ Second, the key terms of “a claim” and “gives rise” are not subject to readily apparent or “ordinary usage” definitions.⁸⁰ Third, the surrounding body of law provides little indication of how the terms should be defined. Finally, all three interpretations substantially “rewrite” the statute and thereby do arguable “violence” to the text. These difficulties explain why the textual analyses in the circuit cases are often strained and, in the end, provide little conclusive, objective insight regarding what “gives rise to a claim” may mean.

2. *The limits of the legislative history*

Recourse to the legislative history has proven equally inconclusive. Statements in the legislative history regarding the FTAIA are sparse, and almost all those materials that do mention it focus entirely on the “effects” test of subsection (1).⁸¹ Of these sources, the House Judiciary Committee Report is the most useful, describing the general purposes of the FTAIA and the “effects” test, though it too makes little mention of the “gives rise to a claim” requirement.⁸² Courts have nevertheless

79. The “gives rise to a claim” requirement does not specify a legal actor. In grammatical terms, the subject of the verb “gives rise” is the “effect.” This creates the interpretive dilemma of determining who, if anyone, must be injured to the extent necessary to give rise to a claim.

80. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 414 (Philip Babcock Gove ed., 2002) (defining “claim” as (1) a demand, (2) a right, (3) an assertion or statement, and (4) an assertion of title); see also BLACK’S LAW DICTIONARY 240 (7th ed. 1999) (defining a claim as (1) “[t]he aggregate of operative facts giving rise to a right enforceable by a court,” (2) “[t]he assertion of an existing right,” and (3) “[a] demand for money or property to which one asserts a right”). Moreover, “to raise” a claim is also ambiguous. The most applicable definitions in BLACK’S LAW DICTIONARY define “raise” as “[t]o bring up for discussion or consideration” or “[t]o create or establish.” *Id.* at 1266. Finally, the strict interpretation of the article “a” by the *Kruman* court and the Higginbotham dissent in *Statoil* is not necessarily the “ordinary usage” of the word.

81. See H.R. REP. NO. 97-637, at 18 (1982), reprinted in 1982 U.S.C.C.A.N. 2431, 2440 (mentioning that the amendment would exempt export trade activities from the Sherman Act as long as they do not “have a direct, substantial, and reasonably foreseeable effect on trade or commerce within the United States”); H.R. REP. NO. 97-686, at 29–30 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2513–14 (describing the “effects” test).

82. H.R. REP. NO. 97-686 (1982), reprinted in 1982 U.S.C.C.A.N. 2487.

focused on this report to determine whether the FTAIA as a whole encourages or discourages suits by foreign plaintiffs, but unfortunately the Report contains passages that support both a narrow⁸³ and a broad⁸⁴ interpretation.

83. The following passages from House Report No. 97-686 are commonly cited to support restrictive jurisdiction under the FTAIA:

A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws. Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions—that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor.

Id. at 9–10, reprinted in 1982 U.S.C.C.A.N. 2487, 2494–95.

The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language to the Sherman and FTC Act amendments to require that the “effect” providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. As previously set forth, it is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States . . .

Id. at 11–12, reprinted in 1982 U.S.C.C.A.N. 2487, 2496–97.

84. The following passages from House Report No. 97-686 are commonly cited to support broad jurisdiction under the FTAIA:

The intent . . . is to exempt from the antitrust laws *conduct* that does not have the requisite domestic effects. This test, however, does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States—*e.g.*, price fixing not limited to the export market—would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf., e.g., Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978). Foreign purchasers should enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do.

Id. at 10, reprinted in 1982 U.S.C.C.A.N. 2487, 2495.

[T]he domestic “effect” that may serve as the predicate for antitrust jurisdiction . . . must be of the type that the antitrust laws prohibit. . . . For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a *beneficial* effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff’s damage claim is based on an extraterritorial effect on him of a different kind.

Id. at 11, reprinted in 1982 U.S.C.C.A.N. 2487, 2496.

Any major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a “spillover” effect on commerce within this country—by creating a world-wide shortage or artificially inflated world-wide price that had the effect of raising domestic prices—the cartel’s conduct would fall within the reach of our antitrust laws. Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce.

C. Applying the Purposivist Approach

Because neither the text nor the legislative history provides clear interpretive answers, the interpreter must look to the purposes underlying the statute for answers. To be sure, such “purposes” are nowhere written and must be inferred from a variety of sources, including the statute’s text, legislative history, and historical context. Once the interpreter succeeds in identifying these “purposes,” she can determine which reading of the statute succeeds in maximizing these goals.

With regards to the FTAIA, the purposivist approach begins by scrutinizing the text, legislative history, and historical context of the statute. Although we have already determined that the text and legislative history do not provide conclusive answers to interpreting statutes, these sources still provide clues as to what Congress may have intended to accomplish with the FTAIA. Based on these sources, the FTAIA seems to be motivated by four policy goals: (1) to capture and deter harmful foreign cartels, (2) to immunize legitimate U.S. business, (3) to avoid unnecessary encroachments of foreign jurisdiction, and (4) to state a simple and clear standard.

1. Capture and deter harmful foreign cartels

Since the *United States v. American Tobacco Co.* case,⁸⁵ U.S. antitrust laws have been applied extraterritorially to root out foreign cartels that have a harmful effect on U.S. commerce. The House Judiciary Committee Report concludes that applying U.S. laws abroad has been very effective in quelling international cartels.⁸⁶

In order to maximize U.S. ability to capture and deter cartels, the FTAIA provides a cause of action for both domestic and foreign plaintiffs. The House Judiciary Committee Report cites the Supreme Court’s decision in *Pfizer, Inc. v. Government of India*, which held that foreign plaintiffs are not denied from asserting antitrust claims under U.S. antitrust laws.⁸⁷ The court reasoned that the potentially enormous private civil judgments of the antitrust laws have the dual purpose of depriving violators of the “fruits of their illegality” and deterring future

Id. at 13, reprinted in 1982 U.S.C.C.A.N. 2487, 2498.

85. 221 U.S. 106 (1911).

86. Testimony by Professor Rahl indicated that “American antitrust laws have been a major factor in ridding the world of many international cartels and enhancing domestic competition.” H.R. REP. NO. 97-686, at 4 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2489.

87. 434 U.S. 308, 315 (1978).

violations.⁸⁸ The Report adopts this reasoning and indicates that foreign plaintiffs would be very useful in detecting foreign antitrust activity.⁸⁹ The Report goes on to explain that allowing foreign plaintiffs to bring suit for foreign anticompetitive activity maximizes the potential damages imposed on cartels. Cartels would be faced with paying damages not only to their American victims, but also to plaintiffs anywhere in the world that are injured by their activities.⁹⁰

2. Immunize legitimate U.S. business

Another purpose of the FTAIA is to immunize legitimate U.S. business from harsh penalties imposed by the antitrust laws. The House Judiciary Committee Report explains that one of the primary purposes of the Act is to address the concern that ambiguities in the antitrust laws were impeding foreign trade.⁹¹ Congress received reports that the antitrust laws acted as a “deal-killer” because companies would back out of productive foreign ventures if there was an indication that the operation could potentially result in an antitrust violation.⁹²

In light of these problems, Congress developed the FTAIA with two goals in mind. First, the Act would clarify the “effects” test by unifying the multitude of legal standards into a single statutory provision.⁹³ Such a provision would putatively give domestic companies more confidence about what they could or could not do. The FTAIA’s second goal would be to allow U.S. firms to profit from other countries’ less stringent competition laws. Congress determined that American companies operating abroad should not be subject to U.S. antitrust law unless the

88. *Id.* at 314.

89. H.R. REP. NO. 97-686, at 10, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495.

90. Without the assistance of foreign plaintiffs, “defendants would continue to violate our laws, willingly risking the smaller amounts of damages payable only to injured domestic persons.” *Id.*

91. *Id.* at 4, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2489. However, the House Report recognizes that the extent of this concern is limited. In 1980, two years before passage of the FTAIA, the U.S. Trade Representative noted that among all of the factors explaining the decrease in U.S. export trade, concern for antitrust violations was limited and no specific instances existed in which the laws actually limited trade. *Id.*

92. *Id.* at 6, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2491 (“As the Business Roundtable has stated, ‘antitrust considerations typically enter the picture long before a business transaction is explored in depth. If these considerations indicate problems, the possible transaction may die on the drawing board well before negotiations are commenced.’” (citation omitted)).

93. *Id.* at 5–6, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490–91.

company's activities have a substantial effect on U.S. commerce.⁹⁴ All activities that are "purely foreign" or that have only a minor effect on U.S. commerce would be immune.⁹⁵ In other words, U.S. companies would be immune from U.S. antitrust jurisdiction and subject only to other countries' laws, if any, as long as the activity did not have a sufficient effect on U.S. commerce. Therefore, U.S. companies could profit from the more relaxed antitrust laws of other countries without risking penalties under U.S. law.⁹⁶

3. Avoid unnecessary encroachment on the authority of foreign jurisdictions

Next, the FTAIA seeks to assert U.S. jurisdiction without intruding on the sovereignty of other nations. As has been discussed, other nations resent the global reach of U.S. law, primarily because U.S. antitrust jurisprudence is poorly articulated, imposes stiff penalties on the unsuspecting, and serves only U.S. interests. The FTAIA was drafted, at least in part, to address these concerns by articulating a more specific "effects" test that operated according to principles of international comity.

The concept of "international comity" or "comity of nations" is somewhat nebulous,⁹⁷ but generally it stands for the principle that the

94. *Id.* at 9–10, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494–95 ("[T]here should be no American antitrust jurisdiction absent a direct, substantial, and reasonably foreseeable effect on domestic commerce or a domestic competitor.").

95. *Id.* The Report specifically states that a company does not have a "substantial effect" on U.S. commerce merely by being owned or operated by U.S. citizens. *Id.* at 9, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494.

96. *See id.* at 10, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495.

[The FTAIA] achieves an important objective of freeing American-owned firms that operate entirely abroad or in United States export trade from the possibility of dual and conflicting antitrust regulation. When their activities lack the requisite domestic effects, they can operate on the same terms, and subject to the same antitrust laws that govern their foreign-owned competitors. To be sure, if the foreign state in question has an antitrust regimen, American-owned firms must still comply. But no longer is there any possibility that, because of uncertainty growing out of American ownership, such firms will be subject to a different and perhaps stricter regimen of antitrust than their competitors of foreign ownership.

Id.

97. Historically, comity has never been a well-defined concept. *See* ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 68 (Clive Parry et al. eds., 1986) (explaining that the notion of comity "has been used from time to time in connection with International Law in the following

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U.S. Antitrust Jurisdiction over Foreign Parties

United States should only exercise jurisdiction over foreign parties in order to protect substantial domestic interests. Traditionally, the United States has a substantial domestic interest when at least one of several preconditions exists:

- (1) the conduct of the foreign parties has had or will have a substantial, direct, and foreseeable effect on the United States;
- (2) the conduct of the foreign parties takes place predominately in the United States;
- (3) the conduct of the foreign parties has a greater effect on the United States than other countries;
- (4) other countries have an attenuated regulatory interest in the matter; and
- (5) applying U.S. law will not conflict with the home laws of the foreign parties.⁹⁸

not easily reconcilable senses: . . . the rules of politeness, convenience, and goodwill observed by States in their mutual intercourse without being legally bound by them.”).

98. This list represents a synthesis taken from several types of comity analysis. Principal among these is the RESTATEMENT (THIRD) OF FOREIGN RELATIONS. Section 403(2) defines eight factors to determine the reasonableness of extraterritorial jurisdiction of U.S. law:

- (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has a substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated . . . ;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(2) (1987). If the laws of two nations are in direct conflict with each other, and both are found to be reasonable under these criteria, then section 403(3) requires that “each state has an obligation to evaluate its own as well as the other state’s interest in exercising jurisdiction, in light of all the relevant factors, [including those set out in] Subsection (2); [and], a state should defer to the other state if that state’s interest is clearly greater.” *Id.* § 403(3).

Another source of comity factors, which has already been mentioned in Part II, *supra*, are the Ninth Circuit’s factors in *Timberlane Lumber Co. v. Bank of America*, which include: (1) the degree of conflict with foreign law or policy, (2) the nationality of the parties and the location of the principle places of business of the corporations, (3) the relative significance of the effects on the United States as compared with other jurisdictions, (4) the extent to which the explicit purpose is to

Although the FTAIA does not expressly require courts to consider each of these factors, it does generally require courts to assert jurisdiction only when important U.S. interests are affected. This conclusion is supported on three grounds: (1) the language of the statute shows a concern for comity, (2) the legislative history explains that courts may utilize comity factors not included in the statute, and (3) the Supreme Court has indicated that it will consider comity factors in certain cases. Other doctrines also suggest that the FTAIA should be understood in light of comity concerns.⁹⁹

affect American commerce, (5) the foreseeability of such effects, and (6) the relative importance of conduct within the United States as compared with conduct abroad. 549 F.2d 597, 614–15 (9th Cir. 1977). For a list of similar factors, see also *Manning Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (1979).

99. One important doctrine is the *Charming Betsy* canon of statutory interpretation, which posits that a domestic court should decline to assert jurisdiction in deference to international law. In *Murray v. Schooner Charming Betsy*, the U.S. Navy seized a private vessel belonging to Jared Shattuck, a Danish citizen of the island of St. Thomas. 6 U.S. (2 Cranch) 64 (1804). The seizure was mandated under the Nonintercourse Act of 1800, which allowed the federal government to seize vessels engaged in trade with France. *Id.* Shattuck argued that as a Danish citizen he was not subject to U.S. law and Chief Justice Marshall agreed, holding that although the statute was not limited to American vessels, it should be so construed because “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Id.* at 118. Courts continue to apply this doctrine in recent decisions. See *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997) (Lynch, J., concurring); *United States v. Vasquez-Velasco*, 15 F.3d 833, 839–40 (9th Cir. 1994); see also *United States v. Hill*, 279 F.3d 731, 739–40 (9th Cir. 2002). Commentators have also recognized that *Charming Betsy* is growing in importance as conflicts with international law become more frequent. See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 536 (1998) (“The number of international cases in U.S. courts continues to grow As a result, the indirect, interpretive role of international law, especially the *Charming Betsy* canon, is likely to become increasingly important.”); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 216 (1993). But see Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1145–46 (1990) (noting the anachronistic qualities of the canon).

The federal government has also issued a publication emphasizing the role of comity in applying U.S. antitrust law. U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1995) [hereinafter GUIDELINES], available at <http://www.usdoj.gov/atr/public/guidelines/internat.htm> (last accessed Nov. 25, 2003). The GUIDELINES are taken from a treaty between the European Union and the United States governing the jurisdictional limits of their respective competition laws. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, U.S.-E.U., art. VI, Hein’s No. KAV 3050, Temp. State Dept. No. 91-216 at 10–11. (stating that the parties would consider comity factors when “it appears that one Party’s enforcement activities may adversely affect important interests of the other Party”). The GUIDELINES provide that “[i]n enforcing the antitrust laws, the Agencies consider international comity.” GUIDELINES, *supra*, at § 3.2. As part of the comity analysis, agencies are to consider whether “one country encourages a

a. The language of the FTAIA indicates a concern for comity. Furthermore, both the “direct, substantial, and reasonably foreseeable effect” requirement of subsection (1) and the “gives rise to a claim” requirement of subsection (2) assure that the FTAIA does not unnecessarily encroach on the jurisdiction of other countries. Subsection (1) is, almost verbatim, one of the traditional comity factors, and as such it only permits U.S. jurisdiction in cases where the activities of foreign parties have a clear effect on domestic interests. Similarly, although subsection (2) is not itself one of the traditional comity factors, it reinforces subsection (1) by requiring the injury to U.S. interests to be concrete enough to give rise to a claim, in which case the injury would be sufficient to assert U.S. jurisdiction. Thus, the overall effect of the text is to assure that U.S. courts operate within comity principles by asserting jurisdiction only over those foreign parties that have harmed U.S. interests or present a significant threat to those interests.

b. The legislative history indicates that courts may utilize comity principles not specifically included in the statute. The House Judiciary Committee Report explains that courts may consider comity factors, although they are not required to. The Report cites the Ninth Circuit’s *Timberlane Lumber Co. v. Bank of America* decision, which held that the court should infuse comity considerations with the legal analysis. Writing for the majority in that case, Judge Choy explained that “[t]he effects test by itself is incomplete because it fails to consider other nations’ interests.”¹⁰⁰ The House Report echoes this concern, explaining that the FTAIA

is intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions. If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts’ ability to employ notions of comity or otherwise to take account of the international character of the transaction.¹⁰¹

certain course of conduct, leaves parties free to choose among different strategies, or prohibits some of those strategies.” *Id.*

100. *Timberlane*, 549 F.2d at 611–12 (citations omitted).

101. H.R. REP. NO. 97-686, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498 (citation omitted).

Courts have appreciated these concerns and have in fact infused comity considerations with the FTAIA.¹⁰²

c. The Supreme Court has indicated it will apply comity analysis in certain circumstances. The Supreme Court has indicated that it will consider principles of comity in interpreting the scope of the FTAIA. In *Hartford Fire Insurance Co. v. California*,¹⁰³ the defendant, a London reinsurer, argued that even if its conduct fell within the scope of the Sherman Act by virtue of the FTAIA, comity considerations barred application of U.S. law to a British company. Writing for a 5-4 majority, Justice Souter declined to decide the question but held that “international comity would not counsel against exercising jurisdiction in the circumstances alleged here. The only substantial question in this litigation is whether ‘there is in fact a true conflict between domestic and foreign law.’”¹⁰⁴ The Court went on to conclude that even though the United Kingdom had enacted a complex regulatory framework for reinsurance, because the British defendants could comply with U.S. law without violating British law, there was no true conflict and therefore no reason to waive jurisdiction on comity grounds.¹⁰⁵ Justice Scalia and three other justices dissented, reasoning that under the *Restatement (Third) of Foreign Relations*, jurisdiction should not be asserted over the British firm because the activity occurred predominately in the United Kingdom and was well within the British regulatory scheme.¹⁰⁶

102. See *Filetech S.A. v. Fr. Telecom S.A.*, 157 F.3d 922, 928–30 (2d Cir. 1998); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 845–47 (9th Cir. 1996).

103. 509 U.S. 764 (1993).

104. *Id.* at 798 (quoting *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 555 (1987)).

105. *Id.* at 798–99.

106. *Id.* at 812–19 (Scalia, J., dissenting). The dissenters found that the issue was not one of subject matter jurisdiction, but of “legislative jurisdiction.” Before a court can even consider whether it has subject matter jurisdiction it must determine if “in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct.” *Id.* at 813 (Scalia, J., dissenting). If Congress did not, the court does not dismiss for lack of subject matter jurisdiction, but rules that the plaintiff has failed to state a cause of action under a relevant statute. *Id.* (Scalia, J., dissenting). The dissenters applied two “canons of statutory construction”: first, unless clearly stated otherwise, congressional acts are limited to the territorial jurisdiction of the United States; and second, when an extraterritorial scope exists, then the *Charming Betsy* canon mandates that the Act “ought never to be construed to violate the law of nations if any other possible construction remains.” *Id.* at 815 (Scalia, J., dissenting).

Scalia reasoned that although the FTAIA indicates that the Sherman Act would have an extraterritorial application, it must still be interpreted in light of the international law of comity. Although he admits that articulating international law is not easy, and in fact makes reference to the

4. *State a clear standard*

Finally, the FTAIA seeks to state a simple standard that will minimize confusion. As already mentioned, the FTAIA was enacted in response to the divergent articulations of the “effects” test adopted by various jurisdictions. The House Report explains that the “enactment of a single objective test . . . will serve as a simple and straightforward clarification of existing American law. . . . A clear benchmark will exist for businessmen, attorneys and judges as well as our trading partners.”¹⁰⁷ This policy goal ultimately seeks to facilitate the other policy goals already mentioned. A simple rule deters foreign cartels by putting them on clear notice; it immunizes U.S. businesses by providing a brightline rule for determining when their activity may or may not be illegal; and it also promotes comity by offering a clear standard for determining when U.S. interests have been implicated.

D. Assessment: What the Purposivist Approach Means for Judicial Interpretation

All four of the policy concerns underlying the FTAIA—(1) the need to capture and deter harmful foreign cartels, (2) the need to immunize legitimate U.S. business from suits arising under the Act, (3) the need to avoid unnecessary encroachments of foreign jurisdiction, and (4) the need to articulate a clear standard—should be considered in determining whether, as a whole, the FTAIA encourages broad or narrow jurisdiction over foreign plaintiffs. As the preceding discussion illustrates, these goals do not necessarily align to create a clear standard. In fact, some of them, such as the need for deterrence and the need for comity, exist in tension with each other. In light of these purposes, the *Kruman* and *Statoil* approaches have serious deficiencies; and although the *Empagran* approach, which defines “a claim” as an “actual or threatened injury,” shares some of these deficiencies, it succeeds in establishing a standard that best coordinates these policy concerns.

attempts in *Timberlane* and related cases, Scalia ultimately relies on the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW and its requirement that prescriptive jurisdiction over “a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.” *Id.* at 819 (Scalia, J., dissenting) (citing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 403(1) (1987)).

107. H.R. REP. NO. 97-686, at 2–3 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2487–88.

1. The merits and problems of broad and narrow jurisdiction: The Kruman and Statoil approaches

a. The Kruman approach. The *Kruman* court found that, once the plaintiff has established the requisite effect on U.S. commerce, the “gives rise to a claim” element should not pose a substantial hurdle to asserting jurisdiction. Under this approach, the plaintiff meets the “gives rise to a claim” prong by merely asserting that the defendant’s anticompetitive conduct would violate the substantive provisions of the Sherman Act regardless of whether a domestic party has actually been injured.¹⁰⁸ This broad approach accomplishes the policy goal of capturing and deterring cartels: it encourages foreign parties to bring suit in the United States and thereby act as whistleblowers to capture foreign cartels that would otherwise elude detection. Moreover, employing the broad approach also maximizes the penalties imposed on foreign cartels by allowing all possible plaintiffs to join in bringing suit.

However, the primary criticism of the *Kruman* approach is that it allows U.S. courts to assert jurisdiction over foreign parties based on hypothetical harm to U.S. commerce. Such a broad basis for U.S. jurisdiction undermines the FTAIA’s policy goal of avoiding unnecessary encroachment on the jurisdiction of other countries.

This problem is compounded by the fact that the *Kruman* approach does not state a simple, logical standard. Determining when conduct has violated the substantive provisions of the Sherman Act is not an easy task because the provisions of the Sherman Act are not codified in a single statutory source. Rather, the provisions of the Sherman Act are contained piecemeal in a multitude of Supreme Court decisions.¹⁰⁹ Although some Sherman Act claims rely on brightline rules, most require some form of detailed factual determination. For example, nearly all Sherman Act claims require a showing of market power, which requires defining the geographic and product markets, the defendant’s market share in each, and other factors that may increase or decrease market power.¹¹⁰ Similarly, many Sherman Act claims are decided by balancing various

108. *Kruman v. Christie’s Int’l PLC*, 284 F.3d 384, 399 (2d Cir. 2002).

109. See the introductory summary of U.S. antitrust jurisdiction *supra* Part II.A.1.

110. See LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* § 2.6 (2000) (describing the procedure for calculating market power); see also *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 425 (2d Cir. 1945) (establishing traditional market power analysis for monopolies); *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 472–75 (1992) (applying market analysis to an illegal tying arrangement).

procompetitive and anticompetitive factors under the “rule of reason.”¹¹¹ Although courts are very capable of wading through these substantive provisions of the Sherman Act, most businesses and foreign parties would not likely find that they provide a simple and straightforward—or even reliable—standard for defining U.S. jurisdiction.

b. The Statoil approach. The *Statoil* court determined that once a foreign plaintiff has established that the requisite effect exists, the “gives rise to a claim” requirement poses a substantial hurdle. Under this approach, the foreign plaintiff must show that its injury has a nexus with the effect on U.S. commerce. The “nexus” rule gives proper deference to comity concerns, recognizing that U.S. law should only reluctantly be applied to foreign parties. In fact, the “nexus” rule assures that U.S. laws stay well within the traditional comity factors: the rule (1) limits imposing U.S. law on foreign nationals, (2) refrains from imposing U.S. law on conduct that occurred predominately in other countries, (3) refrains from remedying injuries that occur in foreign nations and are subject to the regulatory interest and competition laws of that country, and, finally, (4) refrains from imposing U.S. law where there is a substantial risk that it will conflict with the home laws of the defendants.

However, this approach also has a number of shortcomings. First, it is overly restrictive and fails to provide far-reaching deterrence. In allowing only plaintiffs injured in U.S. commerce to bring suit in U.S. courts, this approach limits the range of potential whistleblower plaintiffs. Also, the narrow interpretation limits the field of potential plaintiffs and, accordingly, subjects defendants to only a fraction of the damages they would otherwise face.¹¹²

111. Courts use the “rule of reason” to determine if a particular class of activity violates the Sherman Act. Essentially the rule of reason balances the procompetitive effects of the activity against the anticompetitive effects. If the latter predominate, then the activity is illegal. *See, e.g., Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) (introducing the primary factors considered in the “rule of reason”).

112. The limits of this approach are perhaps best illustrated in the facts of *Kruman*. In that case, several plaintiffs, both foreign and domestic, alleged that both a U.S. and a British auction house had formed a cartel to fix prices for their services in the U.S. and European markets, 284 F.3d at 390–91. Under the “nexus” rule, the court would have jurisdiction over the American plaintiffs because their injuries occurred in the “U.S. market.” However, the European plaintiffs would not be able to join the suit because their injuries occurred in the European market. Therefore, the violators, if found guilty, would only be subject to the damages awarded to the American plaintiffs, which would be only a fraction of the total damages inflicted. Therefore, the risk of treble damages in the United States would not deter a foreign cartel as long as the cartel could operate successfully and the value received from exploiting other markets exceeded its liabilities from operating in the U.S. market.

Secondly, this approach also fails to articulate a precise standard for determining jurisdiction because *Statoil* fails to define the type of nexus required. The court seemed to define the nexus in simple geographic terms; the court refused to assert jurisdiction essentially because the North Sea (where the plaintiff was injured) did not have a nexus with the Gulf of Mexico (where the effect occurred). Future cases will likely have trouble applying this rule because the geographic distinction between the plaintiff and the United States may not always be as clear as it was in *Statoil*. For example, a more difficult case would be one in which a Canadian plaintiff suffering antitrust injury in Toronto claims that the foreign cartel causing its injury also wrongfully raised prices in Buffalo. Because *Statoil* does not explain the criteria for establishing an injury “nexus” with U.S. commerce, such a scenario could produce a variety of results. The court could find that a “nexus” exists simply because Toronto and Buffalo are geographically proximate. It may also find that a “nexus” exists because both Canada and the U.S. belong to a common trade zone, like NAFTA. However, the court may also find that no “nexus” exists simply because the plaintiff is Canadian and did not do a significant amount of business in the U.S. In any event, the “nexus” standard provides no concrete guidance to foreign or domestic companies.

2. *The superiority of the Empagran approach*

The D.C. Circuit’s approach to the FTAIA in *Empagran* is the most effective because it captures many of the benefits of the other two approaches while minimizing their problems. The court found that once a foreign plaintiff has established the requisite effect on U.S. commerce, the “gives rise to a claim” requirement acts as another hurdle that restricts foreign plaintiffs from bringing suit in the United States unless they can show that actual persons or entities in the United States have suffered actual or threatened injury. This approach is the most effective for several reasons.

First, like the *Kruman* approach, it maximizes the deterrent effect of the FTAIA by allowing plaintiffs injured outside of the United States to bring suit. This allows foreign parties to act as whistleblowers to alert the United States to cartels that would not have otherwise been detected. This approach also deters cartels by allowing their victims to maximize the damages imposed.

The *Empagran* approach, like the *Statoil* approach, also avoids unnecessary encroachment on the jurisdiction of other countries in two

ways. First, it assures a strong domestic interest by allowing U.S. courts to assert jurisdiction over foreign parties only when actual persons or entities in the United States have suffered real injury. Second, the *Empagran* approach also preserves comity by creating an incentive for foreign plaintiffs to team up with American plaintiffs. Because American plaintiffs almost automatically meet the “gives rise to a claim” requirement, foreign plaintiffs can easily pass the FTAIA’s jurisdictional requirements if they bring suit with a domestic plaintiff who can claim actual injury. Such a pairing will also ensure that the United States will have a justified interest in the outcome sufficient to warrant exercising jurisdiction over foreign parties.

Finally, the *Empagran* approach also states a simple standard that protects legitimate U.S. businesses and foreign parties. The “actual or threatened” injury requirement is simply stated, relatively unambiguous, and ultimately logical. Most parties would anticipate being subject to U.S. jurisdiction if their activities actually cause, or threaten to cause, injury to parties in the United States. This standard also protects U.S. businesses and foreign parties by requiring plaintiffs to meet a higher evidentiary burden. Unlike the *Kruman* approach, which allows jurisdiction based on a showing of a violation of the substantive provisions of the Sherman Act, the *Empagran* approach requires a plaintiff to prove not only that injury is imminent, but also that an actual person or entity has been harmed. This type of factual burden accords with the recent Supreme Court trend that favors the evidence of injury presented by actual people rather than abstract proof of injury presented theoretically through economic models.¹¹³ Finally, requiring actual injury also assures U.S. businesses and foreign parties that as long their conduct does not cause actual injury to an actual person in the United States, their transactions will be completely exempt from U.S. antitrust laws. Such an assurance would allow U.S. businesses and foreign parties

113. See, e.g., *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 472–77 (1992) (indicating that the court gives preference to actual facts over economic models). The case involved allegations of a tying arrangement through which Kodak limited the market for repair services for its photocopiers and essentially compelled clients to purchase its own repair services. Kodak presented economic models in its defense, arguing that it had not limited the repair market because to do so would be economically irrational and result in a ruinous loss of customers. However, the plaintiff successfully rebutted this economic model with facts that showed that limiting the repair market would, in reality, be profitable to the defendant rather than “ruinous.” Defendant provided evidence that, in contrast to the defendant’s economic model, (1) customers usually did not factor the cost of repairs into the purchase of a copier, and (2) the high cost of switching machines caused consumers to accept the high repair costs of the Kodak machines.

to make use of other countries' more lenient laws without fear of being subject to U.S. jurisdiction.

V. CONCLUSION: SUGGESTIONS FOR POSSIBLE CONGRESSIONAL ACTION

Having reviewed many of the complexities of the FTAIA, it seems fair to conclude that the so-called "antitrust improvement act" has ultimately done much to complicate antitrust jurisprudence. The courts have done their best to make sense of the "gives rise to a claim" requirement, but it may be up to Congress to fulfill the promise of the FTAIA by amending the statute. Congress could feasibly improve the FTAIA in one of two ways—either by eliminating the "gives rise to a claim" requirement altogether, or by modifying it to reflect the holding in *Empagran*.

Several arguments can be made that Congress should do away with the "gives rise to a claim" requirement. First, the requirement is largely unnecessary: it only comes into play in the narrow set of circumstances in which a foreign plaintiff injured in another country seeks relief in U.S. courts. In all other cases, the "gives rise to a claim" requirement is superfluous because U.S. plaintiffs will automatically meet the requirement. Moreover, the ambiguities of the "gives rise to a claim" requirement have ultimately corrupted the FTAIA and rendered it unworkable. A sure sign of a dysfunctional statute is the fact that no two courts seem to arrive at the same interpretation. The FTAIA is open to a multitude of meanings and courts will likely continue to find new interpretations. This variety of standards ultimately curtails the FTAIA's purpose of articulating a "simple and straightforward" rule.

Finally, the FTAIA would function just as well, if not better, without the "gives rise to a claim" requirement because the "direct, substantial, and reasonably foreseeable effect" component of the FTAIA, standing alone, is a sufficient standard. Unhindered by the "gives rise to a claim" requirement, the "effects" test alone would accomplish many of the goals of the FTAIA: it states a simple standard, maximizes deterrence, protects U.S. companies, and assures that U.S. courts do not overstep the bounds of comity. In fact, it is notable that in the committee reports accompanying the Act, the "effects" test is the centerpiece, while Congress seemed to give little, if any, consideration to the "gives rise to a claim" requirement. Even the Conference Report, passed on the eve of the FTAIA's passage, fails to mention the "gives rise to a claim" requirement, which strongly suggests that the requirement is one that could simply be forgotten.

Nonetheless, despite these arguments, the best response may be for Congress to amend the FTAIA to reflect the holding in *Empagran*. The

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modified statute would require foreign plaintiffs to show that the effect on U.S. commerce was of sufficient magnitude to “give rise to an *actual claim by a private party in the United States.*” Such a modification would give the requirement a practical role—it would no longer be a mere flourish to the “effects” test, but would impose a concrete threshold requirement for foreign plaintiffs. Not only must they show that the anticompetitive conduct had an effect on the U.S., but that it resulted in actual harm to actual persons. More importantly, such a standard has the appeal of simplicity in that it reduces the “effects” test to a clear, straightforward standard. Foreign businesses could gauge their liability by asking a simple question: Will our conduct cause actual injury to U.S. companies? If so, they know they are on the wrong side of the line.

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